ED
02 526 AUG 20 2002
OFFICE OF THE CLERK

No.

In the

SUPREME COURT OF THE UNITED STATES

WILLEM C. ONINK and MARSHA ONINK,

Petitioners,

v.

SAMUEL DUKE CARDELUCCI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRED J. KNEZ
Attorney of Record
LAW OFFICES OF FRED J. KNEZ
18493 Halter Lane
Post Office Box 70090
Riverside, CA 92513
(909) 789-1832
Attorney for Petitioners

AK PP

QUESTIONS PRESENTED

1. By use of the words, "interest at the legal rate" in 11 U.S.C. § 726(a)(5), did Congress intend to limit the recovery of post petition interest on a state judgment against a solvent debtor to the Federal Statutory rate under 28 U.S.C. § 1961(a) and thereby overrule this Court's long standing mandate in *Vanston Bondholders Protective Committee v Green*, 329 U.S. 156(1946) that the determination of post petition interest depends on the equities of each case?

2. Does the decision of the 9th Circuit conflict with important decisions of this Court and invoive an important Federal question which should be resolved by this Court?

PARTIES TO THE PROCEEDINGS

Petitioners are Willem C. Onink and his wife, Marsha Onink, Appellants below.

Respondent is Samuel Duke Cardelucci, Appellee and Judgment Debtor below.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 4

STATEMENT OF CASE 5

REASONS FOR GRANTING THE WRIT 10

A. THE NINTH CIRCUIT'S INTERPRETATION OF 11 U.S.C.§ 726(a)(5) IS ERRONEOUS IN THAT CONGRESS DID NOT INTEND BY USE OF THE WORDS, "INTEREST AT THE LEGAL RATE" TO LIMIT THE RECOVERY OF POST-PETITION INTEREST ON STATE JUDGMENTS AGAINST SOLVENT DEBTORS TO THE FEDERAL STATUTORY RATE UNDER SECTION 28 U.S.C.§ 1961(a) 10

B. THE NINTH CIRCUIT'S DECISION IS REPUGNANT TO THIS COURT'S DECISION IN *VANSTON BONDHOLDERS PROTECTIVE COMMITTEE v GREEN* AND THE LONG STANDING RULE OF BANKRUPTCY LAW THAT DECISIONS REGARDING INTEREST IN BANKRUPTCY MUST BALANCE THE EQUITIES BETWEEN CREDITOR AND CREDITOR *AND BETWEEN CREDITOR AND DEBTOR* *15*

C. THE LANGUAGE OF 11 USC § 726(a)(5) REFLECTS THE RECOGNITION BY CONGRESS THAT THE APPROPRIATE RATE OF INTEREST DEPENDS ON THE FACTS AND EQUITIES OF THE PARTICULAR CASE 18

A. THE REASONING OF *BEGUELIN* IS REPUGNANT TO FUNDAMENTAL PRINCIPLES OF BANKRUPTCY LAW WHEN APPLIED TO THE INSTANT CASE *24*

CONCLUSION 29

APPENDIX

CIRCUIT COURT OPINION 32

TABLE OF AUTHORITIES

Cases

In re A & L Properties, 96 BR 287
(CD Cal 1988) 19,20

In re Beck, 128 BR 571 (Bankr 1991) 20

In re Beguelin, 220 BR 94 (1998) .. 3,4,7,8,25,26,28

In re Boston & Marine Corp
719 F. 2d 493, 496 (1st Cir 1983) 12,24

In re Carter, 220 BR 411
(BKRTZY. DNM 1998) 10,26

In re Godsey, 134 BR 865, 867
(Bankr MD Ten 1991) 19,22,25

In re Kentucky Lumber Co.
860 F.2d 674 (6th Cir 1998) 12,25

In re Melenyzer, 143 BR 829
(Bankr WD Tex 1992) 22,24,25

In re San Joaquin Estates, 64 BR 534
(9th Cir BAP 1986) 20

In re Schaffer Furniture Co., 68 BR 827, 931
(Bankr ED PA 1987) 19,20

In re Schoeneberg, 156 BR 963, 972
(Bankr WD Tex 1993) 19,20

In re Thompson, 16 F. 3d 576,581
(4th Cir. 1994) 10

United States v Ron Pare Enterprises Inc.
(1989) 489 U.S. 235, 254, 109 S. Ct.
1026, 103 L. Ed 290 13

United States Savings Association of Texas v
Timbers of Inwood Forest Associates
LTD, 484 U.S. 365, 380 (1988) 14

Vanston Bondholders Protective Committee
v Green, 329 U.S. 156, 67 S. Ct. 237,
91 L.Ed 162 (1946) 16,17,29

Statutes

11 U.S.C.§ 726(a)(5) 4,8,10,13,14,17,18,29
28 U.S.C.§ 1254(1) 4
28 U.S.C.§ 1785(g) 11
28 U.S.C.§ 1961(a) 11,14,18
28 U.S.C.§ 6601 11
28 U.S.C.§ 6611 11
28 U.S.C.§ 6612 11
42 U.S.C.§ 1322 11
California Business & Professions Code § 17043 .. 5

IN THE
SUPREME COURT OF THE UNITED STATES

WILLEM C. ONINK and
MARSHA ONINK,

Petitioners,

V.

SAMUEL DUKE CARDELUCCI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLEM C. ONINK and MARSHA ONINK, Petitioners, hereby respectfully request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

This dispute began in 1993 when Petitioners obtained a State Court judgment against Respondent and his rubbish companies for predatory pricing in

violation of California's Unfair Trade Practices Statute. The State Court entered a judgment in the sum of $5,423,825.50 plus interest at the State rate of 10% per annum. Respondent appealed the State Court judgment and, instead of posting a bond pending appeal, Respondent filed a voluntary petition for relief under Chapter 11 of the Federal Bankruptcy laws.

The State Court judgment was affirmed on appeal although the amount of damages was modified to $5,273,147.50 plus interest at the State interest rate of 10%. In subsequent bankruptcy proceedings, the parties agreed that Petitioners were entitled to post petition interest. However, the parties disputed whether the applicable interest rate was California's statutory interest rate of 10% or the Federal interest rate. The parties did not dispute that Respondent was and is solvent and that Petitioners were the only creditor.

The Bankruptcy Court ruled that the Federal interest rate of approximately 3.5% rather than the State judgment interest rate of 10% applied to Petitioners' State Court judgment. However, the Bankruptcy Court made clear that its decision was not based upon a determination of the equities between the parties but rather, the decision in *In re Beguelin*, 220 BR 94 (1998) which the Bankruptcy Court felt bound to follow. At the hearing on Petitioners' Motion for the award of post petition interest, the Bankruptcy Court acknowledged that all of the equities were on the side of Petitioners and that application of the Federal interest rate to the instant case was "disquieting;" that the system in this case "has been used in a way that it wasn't intended to be used;" that "as a court of equity, it doesn't fit real comfortably in this case;" that the Court was "reluctant" to apply the Federal rate; and that the concepts in

Beguelin are "troublesome concepts." [Excerpts of Record, pp 69,70,72] In short, the Bankruptcy Court, a Court of equity, felt its hands had been tied by the decision of the Appellate Panel of the Ninth Circuit under *In re Beguelin*, supra.

Petitioners appealed the decision of the Bankruptcy Court and, following *In re Beguelin*, the United States Court of Appeals for the Ninth Circuit, affirmed in a decision filed April 12, 2002. Petitioners petitioned for rehearing was denied on May 22, 2002.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1), and in particular, jurisdiction over federal questions concerning the meaning of 11 U.S.C.§ 726(a)(5) and whether a solvent State Court judgment debtor can use the bankruptcy laws to avoid application of State law governing interest on State judgments.

STATEMENT OF CASE

Respondent owns and operates several rubbish companies in Southern California including National Environmental Waste Corporation ["NEWCO"] and International Rubbish Service Inc. ["INTERNATIONAL"]. Beginning in 1986, Respondent engaged in predatory pricing in the County of Riverside thereby forcing several small rubbish companies out of business including Petitioners. On January 15, 1993, a State Court jury found by unanimous verdict that Respondent, NEWCO and INTERNATIONAL were jointly and severally liable to Petitioners for intentionally selling rubbish collection services below cost with the specific intent and purpose of destroying competition. Such conduct constitutes an Unfair Trade Practice in violation of California State Statute. See *California Business & Professions Code* §

17043.

Following entry of judgment of $5,423,825.50, Respondent, NEWCO & INTERNATIONAL brought an appeal to the Fourth Appellate District of the State of California, Division Two. Shortly thereafter, on May 3, 1993, Respondent filed a Petition for Reorganization under Chapter 11. Respondent then requested a modification of the automatic stay to facilitate his appeal of the jury's verdict in the State Court.

In February 1996, the State Court of Appeal affirmed the judgment on all liability issues but remanded the case to the trial court for recalculation of damages. Following a recalculation of damages at $5,448,647.50, Respondent again appealed to the Court of Appeals. In June 1999, and with one slight modification, the Court of Appeal affirmed the trial Court's recalculation of damages at $5,273,147.50.

Respondents' petitioned for review to the California Supreme Court was denied in November 1999.

On December 29, 1999, Petitioners brought a Motion before the Bankruptcy Court for an order awarding post petition interest. The Bankruptcy Court determined that Appellants were entitled to post petition interest on their State Court judgment but held that under *In re Beguelin*, 220 BR 94 (1998) the applicable interest rate for distributions on Respondent's State Judgment was the interest rate for Federal judgments rather than the State judgment rate. As aforesaid, at the hearing on the Motion the Bankruptcy Court felt that its hands were tied by the Ninth Circuit's decision in *In re Beguelin*, supra, and that the Bankruptcy law "has been used in a way that it wasn't intended to be used."

Petitioners appealed the decision of the Bankruptcy Court and the Ninth Circuit affirmed. [See

Appendix A] The decision of the Ninth Circuit followed the prior decision of the Bankruptcy Appellate Panel of the Ninth Circuit in *In re Beguelin*, supra, that application of the Federal interest rate in all cases promotes "fairness among creditors" and "is the most judicially efficient and practical manner of allocating remaining assets." [Appendix A, p 5529] In the decision, the Ninth Circuit interprets the words, "interest at the legal rate" under 11 U.S.C.§ 726(a)(5) to mean interest at the Federal interest rate because Congress used the definite article "the" instead of the indefinite article "a" or "an" which according to the Ninth Circuit means that Congress intended a "single source" to be used to calculate post petition interest. [Appendix A, p 5527] In the decision, the Ninth Circuit acknowledges that the debtor in this case is solvent and there are not conflicting claims by multiple

creditors. In fact, the Court states the following in its decision:

> "The Court recognizes that these two interests, fairness among creditors and administrative efficiency, may be of limited relevance in certain bankruptcy proceedings. Where there are only a few unsecured creditors seeking post petition interest and there are sufficient assets to pay all claims of all interest, there will be no concerns regarding equity among creditors or practicality. In those instances, a debtor may receive a windfall from the application of a lower federal interest rate to an award of post judgment petition interest." [Appendix A, pp 5529-5530]

Despite the foregoing statement by the Court and after a lengthy discussion of the reasons why 11 U.S.C.§ 726(a)(5) should be *interpreted* to mean interest at the *Federal* interest rate, the Ninth Circuit then summarily states:

> "None the less, 'interest at the legal rate' is a statutory term with a definite meaning that cannot shift depending on the interest invoked by the specific factual circumstances before the court. (See In re Thompson, 16 F. 3d 576, 581 (4th Cir. 1994)" [Appendix A, p 5530]

REASONS FOR GRANTING THE WRIT

A. THE NINTH CIRCUIT'S INTERPRETATION OF 11 U.S.C.§ 726(a)(5) IS ERRONEOUS IN THAT CONGRESS DID NOT INTEND BY USE OF THE WORDS, "INTEREST AT THE LEGAL RATE" TO LIMIT THE RECOVERY OF POST-PETITION INTEREST ON STATE JUDGMENTS AGAINST SOLVENT DEBTORS TO THE FEDERAL STATUTORY

RATE UNDER SECTION 28 U.S.C.§ 1961(a).

If Congress truly intended to limit post-petition interest on State Court judgments to the Federal interest rate then Congress would have simply said: "interest at the Federal rate." This is true for several reasons: **First**, Congress has specified a particular interest rate in other instances. See, for example, 28 U.S.C. § 1785(g); 28 U.S.C.§§ 6601, 6611, 6612; 42 U.S.C.§ 1322. Had Congress intended the words "legal rate" to be the rate applied to Federal judgments it would have simply said, interest at the Federal rate or interest at the rate provided under Federal law or, interest at the rate provided under 28 U.S.C. § 1961(a).

Second, Congress was aware of the conflicting lines of authority on the issue of post-petition interest and if Congress intended to resolve this conflict by adopting the Federal rate approach, then Congress

would have used language which would have clearly expressed that intent. General principles of statutory construction provide for the presumption that Congress had a full awareness of the prior application of interest based on principles of equity and is presumed to have read and considered the numerous cases emphasizing the underlying policy that such decisions balance the equities between creditor and creditor and between creditor and debtor. See *In re Kentucky Lumber Co*, 860 F.2d 674 (6th Cir 1998, citing *In re Boston & Marine Corp*, 719 F. 2d 493, 496 (1st Cir 1983)). Therefore, if Congress had intended to resolve the conflict then Congress would have used words that would have clearly expressed the intention of Congress to adopt the Federal interest rate approach.

Third, the Ninth Circuit decision argues that when the words "legal rate" have been used by

Congress in the past, Congress has intended to refer to the "statutory rate" of interest. If this were true, then Congress would have used the words "Federal statutory rate." It does not follow that Congress would use the words "legal rate" on the *assumption* that courts would subsequently "interpret" such language to mean the Federal interest rate when Congress could have simply use the words "Federal interest rate."

Fourth, there is no evidence that Congress intended to change prior law. There is nothing in the legislative history to section 726(a)(5) to suggest an intention by Congress to change prior law. In the context of interpreting other provisions of the Bankruptcy Code, this Court has observed, "it is most improbable that a change in the existing Bankruptcy rules would have been made without even any mention in the legislative history." *United States v Ron Pare*

Enterprises Inc. (1989) 489 U.S. 235, 254, 109 S. Ct. 1026, 103 L. Ed. 2d 290, citing *United States Savings Association of Texas v Timbers of Inwood Forest Associates, LTD*, 484 U.S. 365, 380 (1988).

Fifth, the fact that Congress did not use the word "Federal" in 11 U.S.C. § 726(a)(5) strongly suggests that Congress did not intend to limit the interest permitted by law to the Federal statutory rate under 28 U.S.C. § 1961(a). Rather, use of the words "interest at the legal rate" reflects an intention by Congress to recognize that the rate will depend on the equities of each case. (See further discussion below).

Finally, the Ninth Circuit's interpretation is not consistent with the overall policy and purpose of the Bankruptcy law. It is reasonable to presume that Congress would be mindful of the added financial burden on the Bankruptcy system not to mention the

inequities to creditors where a solvent debtor seeks to avoid either a higher interest rate under State statutory law or a rate of interest specified in a contract between the creditor and solvent debtor. In the absence of any supporting legislative history, it is not reasonable to say that Congress intended to create a mechanism for solvent State judgment debtors to shop for a lower interest rate through the Bankruptcy system at the expense of Federal tax payers and to the prejudice of their creditors.

B. THE NINTH CIRCUIT'S DECISION IS REPUGNANT TO THIS COURT'S DECISION IN *VANSTON BONDHOLDERS PROTECTIVE COMMITTEE v GREEN* AND THE LONG STANDING RULE OF BANKRUPTCY LAW THAT DECISIONS REGARDING INTEREST IN BANKRUPTCY MUST BALANCE THE EQUITIES BETWEEN CREDITOR AND CREDITOR *AND BETWEEN CREDITOR AND DEBTOR*.

Petitioners' Opening Brief to the Ninth Circuit squarely presented to the Court the issue under this

Court's decision in *Vanston Bondholders Protective Committee v Green*, 329 U.S. 156, 67 S. Ct. 237, 91 L. Ed. 162 (1946) and in particular, this Court's holding therein, that it is "manifest" that each decision regarding interest in Bankruptcy must balance the equities between creditor and creditor and between creditor and debtor. Although the issue regarding interest in the *Vanston Bondholders* case was different from the instant case, the requirement that "each decision" regarding interest requires a balancing of equities, has remained constant. No decision of this Court has ever deviated from this fundamental rule that the equities be balanced between creditor and creditor *and between creditor and debtor*. In *Vanston v Bondholders*, this Court noted that cases have in the past determined that where the estate was "ample to pay all creditors and to pay interest even after the Petition was filed, equitable

considerations were invoked to permit payment of interest to the secured creditor rather than to the debtor. [329 U.S., at 164-165] Although the Ninth Circuit's decision makes reference to this Court's decision in *Vanston Bondholders*, no where in the opinion is there any explanation as to how Congress could have possible intended by use of the words "interest at the legal rate" to set aside a long standing rule of law requiring the balancing of equities in every decision involving the issue of interest. The Ninth Circuit's decision offers no valid explanation for a departure from this long standing rule of law. It does not point to any legislative history to 11 U.S.C.§ 726(a)(5) which would justify the Ninth Circuit's decision. Nor does the Court offer any explanation in its decision as to how the language in 11 U.S.C. § 726(a)(5) can have a "definitive meaning" when the Court itself found it necessary to engage in an

analysis and interpretation before determining that the words "interest at the legal rate" was intended by Congress to mean interest at the Federal interest rate under 28 U.S.C.§ 1961(a).

C. THE LANGUAGE OF 11 USC § 726(a)(5) REFLECTS THE RECOGNITION BY CONGRESS THAT THE APPROPRIATE RATE OF INTEREST DEPENDS ON THE FACTS AND EQUITIES OF THE PARTICULAR CASE.

It should be apparent that Congress intentionally used the words "interest at the legal rate" because Congress recognized that each case would be unique and rest on its own facts. This is seen from a review of the many, conflicting published decisions on the meaning of the term "legal rate of interest," as provided by Section 726(a)(5). Some Courts have followed what is commonly referred to as the "state law approach." Specifically, if a contract exists between the debtor and creditor that establishes an interest rate on the

outstanding balance, the contract rate is the "legal rate." See such as, *In re Schoeneberg*, 156 BR 963, 972 (Bankr. W D Tex. 1993). If a specific state statute exists that establishes a rate of interest for a creditor, the state interest rate is the "legal rate." See *In re Schaffer Furniture Co.*, 68 BR 827, 931 (Bankr. ED PA. 1987).

Other courts follow the so called "Federal judgment rate approach" and suggest that the legal rate is the rate of interest established by 28 USC § 1961. See, *In re Godsey*, 134 BR 865, 867 (Bankr. MD Ten 1991).

An analysis of the facts underlying the cases reveals that certain factors have triggered most of the decisions. For instance, *most* of the cases following the State judgment interest approach have involved a *solvent* debtor. See, *In re Carter*, 220 BR 411 (BKRTZY. DNM. 1998); *In re A & L Properties*, 96

BR 287 (CD Cal. 1988); *In re Beck*, 128 BR 571 (Bankr. 1991); *In re San Joaquin Estates*, 64 BR 534 (9th Cir BAP 1986); *In re Schoeneberg*, 156 BR 963 (Bankr WD Tex. 1993); and, *In re Schaffer Furniture Co.*, 68 BR 827 (Bankr ED PA 1987). The reason most often given by these Courts is best expressed by the Court in *In re A & L Properties*:

> ". . . where a debtor has contracted for a rate of interest, and has sufficient funds to pay the bargained for amount, the creditor is entitled to the agreed upon rate. Under any other result, the debtor would be permitted to retain value directly at the expense of the creditor. Ordinarily, bankruptcy laws and rules affect the rights of creditors in favor of or at the expense of other creditors by

changing the rules that would prevail outside a Bankruptcy Court in order to more equitably allocate the values of the debtor among the creditors. The alteration of a valid, binding, and legal contractual obligation, so that the debtor retains non exempt property prior to the payment of its valid debts, is a legally startling and somewhat appalling result. Under this 'legal rate' theory, the Bankruptcy Code effectively states that the statutory rate of interest is preferred to the rate of interest to which the parties have themselves agreed and that the difference should be retained by the debtor. There does not appear to be any substantial policy consideration that

would sanction this result...

* * * * * * *

". . . Where the debtor's estate proves solvent, a contract creditor is entitled to post-petition interest at the rate set forth in the contract. This rate is the 'legal rate' for purposes of section 726(a)(5)."

[96 BR, at 290]

Most cases following the Federal judgment interest rate approach involve an *insolvent* debtor and *multiple* creditors with varying contractual interest rates. See *In re Melenyzer*, 143 BR 829 (Bankr WD Tex 1992) and *In re Godsey*, 134 BR 865 (Bankr MD Ten 1991). These cases have emphasized that where there are multiple creditors, a Federal judgment interest rate applicable to all provides for "fairness among creditors." Representative of the explanation given by these Courts is the following statement from *Melenyzer*,

supra:

> "The problem with the State law approach is that different creditors will have different rates of interest, depending upon their contracts or the applicable statutory rate. One contract might provide for interest at 18%, another at 9%, one State statute might set the rate at 10%, another applicable statute a rate of 6%. . . . .
>
> "Quite often, . . .there are only enough assets to pay *some* interest to the creditors, *not* enough to pay *all* creditors *all* the interest they claim at their contract or statutory rates. Using those rate [sic], some creditors would receive a disportionately large percentage of the

remaining assets compared to their underlying unsecured claims, to the prejudice not of the debtor, but of other, otherwise equally situated, unsecured creditors." [143 BR, at 832]

Cases following the Federal judgment interest rate argue that the foregoing concerns over multiple creditor claims and insufficient funds to satisfy all individual interest claims, dictates application of a single Federal judgment interest rate because it facilitates fairness among creditors and provides a simple solution. But where the debtor is solvent and there is no issue regarding conflicting creditor claims over insufficient funds, the rationale underlying application of the Federal judgment interest rule simply does not exist.

D. THE REASONING OF *BEGUELIN* IS REPUGNANT TO FUNDAMENTAL

PRINCIPLES OF BANKRUPTCY LAW WHEN APPLIED TO THE INSTANT CASE.

Application of the Federal judgment interest rule to cases where the debtor is solvent and there is no concern regarding multiple conflicting creditor claims on insufficient funds, violates the overriding policy governing the allowance of post-petition interest in bankruptcy that any decision balance the equities between creditor and creditor *and between creditor and debtor*. See *In re Kentucky Lumber Co*, 860 F2d 674 (6th Cir 1998), citing *In re Boston & Maine Corporation,* 719 F2d 493, 496 (1st Cir 1983). The Court in *In re Beguelin*, supra, failed to analyze the rate of interest issue in conjunction with the policy of achieving fairness both between creditors and *between the creditor and debtor*. The Court in *Beguelin*, relied upon the decisions in *In re Melenyzer* and *In re Godsey* even though those cases involved an *insolvent* debtor

and multiple creditors. Thus, the Court in *In re Carter*, supra, criticized the Court in *Beguelin* for having "overlooked the underlying policy of the Code to avoid producing a windfall for the debtor. The Court in *In re Carter* states:

> "It appears to this Court that, in reaching its conclusion, the Beguelin Court may have overlooked the underlying policy of the Code to avoid producing a windfall for the debtor. As noted earlier, the Code provides that if there is a surplus produced by the estate after all claims are paid, then interest should be paid out on those claims before any surplus is returned to the debtor. Under the facts of this case, if the Court were to modify the originally contracted for

interest rate as suggested in Beguelin, it would result in a windfall to the debtor in that property would be returned to the debtor at WCB's expense. To that end, this Court holds that in situations such as the one at bar, if the solvent estate produces a sufficient surplus from which to pay interest in full to all claimants at the rates prescribed in underlying agreements, contracts, or judgments, then that is the interest rate that should be applied by the Court. We do not have to determine what interest rate should be applied when there is not a sufficient surplus to pay interest in full at contract rates to all claimants. It seems, however, in that situation, the

reasoning contained in Beguelin might be applicable." [220 BR, at 416-417]

In the instant case, the debtor's conduct in 1986 forced Appellants out of the rubbish business in 1987. After obtaining a judgment against the debtor in January 1993, the debtor prolonged recovery on the judgment for more than 6 years and will obviously obtain a windfall if allowed to avoid the State interest rate of 10% on the judgment. None of the cases discussing this issue have ever suggested that Congress intended by use of the words "interest at the legal rate" to provide a mechanism for State judgment debtors to avoid State interest rates by bringing a Chapter 11 Bankruptcy Petition. Bankruptcy laws were never intended to allow a State judgment debtor to shop for a lower interest rate through the Bankruptcy Courts or receive a windfall from pursuing a Bankruptcy Petition.

Any interpretation of section 726(a)(5), must necessarily take into consideration the overall purpose of the Bankruptcy laws and the policy considerations of fairness among creditors as well as fairness between creditor and debtor. This is consistent with the mandate of the US Supreme Court that post-petition interest is dependent upon the **equities of the case.** See *Vanston Bond Holders Protective Committee v Green*, 329 US 156, 67 S Ct 237, 91 L Ed 162 (1946).

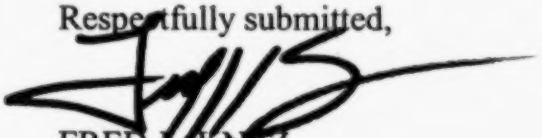
CONCLUSION

In the instant case, Respondent's conduct forced Petitioners out of business thirteen years ago and even though they obtained a judgment in January 1993, Respondent managed to delay Petitioners' recovery of their State judgment for another six and a half years. Imposition of a Federal judgment interest rate of approximately 3.5% as opposed to the 10% required

under State law, clearly provides a windfall to Respondent.

Where the debtor is solvent or there are sufficient funds in the estate to pay interest in full to all creditors at the rates prescribed in the underlying agreements between the debtor and creditor or the rate prescribed by the applicable State statute, then that interest rate is the legal rate of interest for purposes of post-petition interest. This rule recognizes and gives preference to the mandate of this Court that post-petition interest is dependent upon the **equities** of the case. The judgment should be reversed.

Respectfully submitted,



FRED J. KNEZ
Attorney of Record
LAW OFFICES OF FRED J. KNEZ
18493 Halter Lane
Post Office Box 70090
Riverside, CA 92513
(909) 789-1832

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: SAMUEL DUKE CARDELUCCI, *Debtor.*	
WILLEM ONINK, MARSHA ONINK, *Appellants,* v. SAMUEL DUKE CARDELUCCI, *Appellee.*	No. 00-56541 D.C. No. CV-00-01990DDP OPINION

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted
January 16, 2002—Pasadena, California

Filed April 12, 2002

Before: Mary M. Schroeder, Chief Judge,
M. Margaret McKeown, Circuit Judge, and Thomas S. Zilly,
District Judge.*

Opinion by Judge Zilly

*Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

SUMMARY

Bankruptcy/Litigation and Procedure (Civil)

The court of appeals affirmed a judgment of the district court. The court held that post-bankruptcy petition interest owed to a creditor pursuant to 11 U.S.C. § 726(a)(5) is to be calculated using the federal interest rate.

Appellee Samuel Cardelucci owned and operated several rubbish companies in Southern California. A California state court jury found that Cardelucci had engaged in predatory pricing and was jointly and severally liable to appellants Willem and Marsha Onink for unfair trade practices. The state court subsequently entered judgment in the amount of $5,423,825.50 plus interest calculated at the rate of 10% per annum in favor of the Oninks. The state court judgment was ultimately affirmed on appeal with the amount of damages modified to $5,273,147.50 plus interest at the applicable legal rate.

After judgment was entered in the state court action, Cardelucci filed a voluntary petition for relief under Chapter 11. Cardelucci's Modification of Fourth Amended Plan of Reorganization provided for payment in full of the Oninks' claim with post-confirmation interest at the rate of 5% and post-petition interest at a rate to be determined under the provisions of the Bankruptcy Code. During subsequent proceedings before the bankruptcy court regarding the Plan, the parties agreed that the Oninks were entitled to post-petition interest but disputed whether the applicable interest rate was California's state statutory interest rate of 10% or the federal interest rate. The bankruptcy court ruled that the federal interest rate of approximately 3.5%, rather than the judgment rate provided for by state law, applied. The Oninks appealed the bankruptcy court's determination to the district court, which affirmed the bankruptcy court's ruling.

The Oninks appealed.

[1] Under § 726(a)(5), when a debtor in bankruptcy is solvent, an unsecured creditor is entitled to payment of interest at the legal rate from the date of the filing of the petition prior to any distribution of remaining assets to the debtor. The Bankruptcy Code does not define the term "interest at the legal rate." [2] The interests of fairness, equality, and predictability in the distribution of interest on creditors' claims, as well as the interest in applying federal law to federal bankruptcy cases, required application of the federal judgment rate.

[3] The principles of statutory interpretation lent strong support to the conclusion that Congress intended "interest at the legal rate" to mean interest at the federal statutory rate pursuant to 28 U.S.C. § 1961(a). [4] The definite article "the" instead of the indefinite "a" or "an" indicated that Congress meant for a single source to be used to calculate post-petition interest. The use of "legal rate" indicated that Congress intended the single source to be statutory because the commonly understood meaning of "at the legal rate" at the time the Bankruptcy Code was enacted was a rate fixed by statute. Congress's choice of the phrase "interest at the legal rate" suggested that it intended for bankruptcy courts to apply one uniform rate defined by federal statute.

[5] Applying a single, easily determined interest rate to all claims for post-petition interest ensures equitable treatment of creditors. By using a uniform interest rate, no single creditor will be eligible for a disproportionate share of any remaining assets to the detriment of other unsecured creditors. [6] In addition to promoting fairness among creditors, application of the federal rate was the most judicially efficient and practical manner of allocating remaining assets. The judgment of the district court had to be affirmed.

COUNSEL

Fred K. Knez, Riverside, California, John A. Boyd, Thompson & Colgate, Riverside, California, for the plaintiffs-appellants.

William M. Burd, Karen Sue Naylor, Burd & Naylor, Santa Ana, California, for the defendant-appellee.

OPINION

ZILLY, District Judge:

Appellants Willem and Marsha Onink appeal the district court's application of the federal interest rate as defined by 28 U.S.C. § 1961(a) to an award of post-petition interest pursuant to 11 U.S.C. § 726(a)(5). This appeal presents the narrow but important issue of whether such post-petition interest is to be calculated using the federal judgment interest rate or is determined by the parties' contract or state law. We conclude that 11 U.S.C. § 726(a)(5) mandates application of the federal interest rate. Accordingly, we AFFIRM.

Appellee Samuel Duke Cardelucci owns and operates several rubbish companies in Southern California. On January 15, 1993, a California state court jury found that Cardelucci had engaged in predatory pricing and was jointly and severally liable to the Oninks for unfair trade practices. The state court subsequently entered judgment in the amount of $5,423,825.50 plus interest calculated at the rate of 10% per annum in favor of the Oninks. The state court judgment was ultimately affirmed on appeal with the amount of damages modified to $5,273,147.50 plus interest at the applicable legal rate.

After judgment was entered in the state court action, Cardelucci filed a voluntary petition for relief under Chapter 11

in the United States Bankruptcy Court for the Central District of California. Cardelucci's Modification of Fourth Amended Plan of Reorganization provided for payment in full of the Oninks' claim with post-confirmation interest at the rate of 5% and post-petition interest at a rate to be determined under the provisions of the Bankruptcy Code. During subsequent proceedings before the bankruptcy court regarding the Plan, the parties agreed that the Oninks were entitled to post-petition interest but disputed whether the applicable interest rate was California's state statutory interest rate of 10% or the federal interest rate. The bankruptcy court held that the federal interest rate of approximately 3.5%, calculated pursuant to 28 U.S.C. § 1961(a), rather than the judgment rate provided for by state law, applied. Thereafter, the Oninks withdrew their objections to the Plan without prejudice to their right to appeal the interest rate determination and the bankruptcy court ordered the Plan confirmed. The Oninks appealed the bankruptcy court's determination to the district court which affirmed the bankruptcy court's ruling. This appeal followed.

This Court reviews de novo the district court's decision on an appeal from a bankruptcy court. *In re Gruntz*, 202 F.3d 1074, 1084 n. 9 (9th Cir. 2000) (en banc). This Court applies the same standard of review applied by the district court. *In re Chang*, 163 F.3d 1138, 1140 (9th Cir. 1998). Statutory interpretation is a question of law subject to de novo review. *In re Celebrity Home Entertainment, Inc.*, 210 F.3d 995, 997 (9th Cir. 2000).

[1] Where a debtor in bankruptcy is solvent, an unsecured creditor is entitled to "payment of interest at the legal rate from the date of the filing of the petition" prior to any distribution of remaining assets to the debtor. 11 U.S.C. § 726(a)(5). The question presented by this appeal is whether "interest at the legal rate" means a rate fixed by federal statute or a rate determined either by the parties' contract or state law. The Bankruptcy Code does not define the term "interest

at the legal rate" and there is a paucity of legislative history regarding this statutory provision.

Although no Court of Appeals has addressed this issue, bankruptcy courts have split over the correct interpretation of this phrase, finding that it either means one single rate as determined by 28 U.S.C. § 1961(a) (the "federal judgment rate approach") or is based on a contract rate or applicable state law (the "state law approach"). *Compare In re Dow Corning Corp.*, 237 B.R. 380, 394 (Bankr. E.D. Mich. 1999) (applying the federal judgment rate), *with In re Carter* 220 B.R. 411, 416-17 (Bankr. D.N.M. 1998) (using the state law approach to determine the appropriate interest rate).

[2] In *In re Beguelin*, 220 B.R. 94, 99 (9th Cir. B.A.P. 1998), the Bankruptcy Appellate Panel of the Ninth Circuit squarely addressed the issue presented in this appeal. The BAP held that the federal judgment rate applied to post-petition interest. *Beguelin*, 220 B.R. at 100. Contrasting the state law and federal judgment rate approaches, the BAP concluded that the interests of "fairness, equality, and predictability in the distribution of interest on creditors' claims" as well as the interest in applying federal law to federal bankruptcy cases, required application of the federal judgment rate approach. *Id.* at 100-101 (citing *In re Melenyzer*, 143 B.R. 829 (Bankr. W.D. Tex. 1992), and *In re Godsey*, 134 B.R. 865 (Bankr. M.D. Tenn. 1991)). While this Court is not bound by a B.A.P. decision, we find the reasoning of *Beguelin* to be persuasive and adopt it. *See Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 471 (9th Cir. 1990).

[3] The principles of statutory interpretation lend strong support to the conclusion that Congress intended "interest at the legal rate" in 11 U.S.C. § 726(a)(5) to mean interest at the federal statutory rate pursuant to 28 U.S.C. § 1961(a). Congress specifically chose the language "interest at the legal rate," replacing the originally proposed language "interest on claims allowed." *Report of the Commission on the Bankruptcy*

Laws of the United States, H.R. Doc. No. 93-137, § 4-405(a)(8), (1st Sess. 1973), *reprinted in* Collier App. Pt. 4(c), at 4-679. This Court "assume[s] that Congress carefully select[s] and intentionally adopt[s] the language" used in a statute. *Ebben v. Comm'r*, 783 F.2d 906, 916 (9th Cir. 1986) (Beezer, J., concurring in part and dissenting in part). Thus, instead of a general statement allowing for awards of interest, Congress modified what type and amount of interest could be awarded with the specific phrasing "at the legal rate."

[4] The definite article "the" instead of the indefinite "a" or "an" indicates that Congress meant for a single source to be used to calculate post-petition interest. *See, e.g., American Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000); *United States v. Kanasco, Ltd.*, 123 F.3d 209, 211 (4th Cir. 1997); *In re Dow Corning Corp.*, 237 B.R. at 404; *Black's Law Dictionary* 1477 (6th ed. 1990) ("In construing statute, definite article 'the' particularizes the subject which it precedes and is word of limitation as opposed to indefinite or generalizing force 'a' or 'an.' "). The use of "legal rate" indicates that Congress intended the single source to be statutory because the commonly understood meaning of "at the legal rate" at the time the Bankruptcy Code was enacted was a rate fixed by statute. *See, e.g., Inv. Serv. Co. v. Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir. 1975) (distinguishing "interest at the legal rate" as a rate defined by statute from a rate determined pursuant to the parties' contract); *In re Dow Corning Corp.*, 237 B.R. at 402 (citing cases). Congress' choice of the phrase "interest at the legal rate" suggests that it intended for bankruptcy courts to apply one uniform rate defined by federal statute. *See* 3 *Norton Bankruptcy Law & Practice* 2d § 73:7 n. 55 (1997 & Supp. 2000) (stating "[i]nterest is set at the federal judgment rate as of the petition date"); 6 *Collier on Bankruptcy* ¶ 726.02(5) (15th ed. rev. 1997) ("The reference in the statute to the 'legal rate' suggests that Congress envisioned a single rate, probably the federal statutory rate for interest on judgments.").

Additionally, using the federal rate promotes uniformity within federal law. Upon the filing of the bankruptcy petition, creditors with a claim against the estate must pursue their rights to the claim in federal court and entitlement to a claim is a matter of federal law. *See Bursch v. Beardsley & Piper*, 971 F.2d 108, 114 (8th Cir. 1992) ("[O]nce a bankruptcy petition is filed, federal law, not state law, determines a creditor's rights."). Absent a timely objection, all claims filed against the bankrupt estate are "deemed allowed" as of the date of filing. 11 U.S.C. § 502(a). This allowed claim, like a judgment, gives the creditor a legal "right to payment" of a specific sum of money against the debtor. 11 U.S.C. § 101(5); 11 U.S.C. § 502(b). As of the date of the filing of the petition, creditors hold a claim, similar to a federal judgment, against the estate, the payment of which is only dependent upon completion of the bankruptcy process. In this respect, the purpose of post-petition interest makes the award analogous to an award of post-judgment interest. *See Kaiser Aluminum and Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835-36 (1990) (stating that the purpose of post-judgment interest is "to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damages and the payment by the defendant") (citation omitted).

It has long been the rule that an award of post-judgment interest is procedural in nature and thereby dictated by federal law. *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965) (stating that procedural matters arising in federal court are decided by federal law). This rule is best illustrated by the difference in treatment of pre-judgment and post-judgment interest in diversity actions. In diversity actions brought in federal court a prevailing plaintiff is entitled to pre-judgment interest at state law rates while post-judgment interest is determined by federal law. *See Northrop Corp. v. Triad Int'l Mktg., S.A.*, 842 F.2d 1154, 1155 (9th Cir. 1988). In bankruptcy, an allowed claim becomes a federal judgment and therefore entitles the holder of the judgment to an award of interest pursuant to fed-

eral statute. *See In re Chiapetta*, 159 B.R. 152, 160-61 (Bankr. E.D. Penn. 1993); *In re Melenyzer*, 143 B.R. at 833.

[5] Lastly, applying a single, easily determined interest rate to all claims for post-petition interest ensures equitable treatment of creditors. An overriding policy consideration in an award of interest to a creditor is the balancing of equities among the creditors. *See Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 165 (1946) ("It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor."). By using a uniform interest rate, no single creditor will be eligible for a disproportionate share of any remaining assets to the detriment of other unsecured creditors. *See Beguelin*, 220 B.R. at 100 (citing *In re Melenyzer*, 143 B.R. at 832).

[6] In addition to promoting fairness among creditors, application of the federal rate is the most judicially efficient and practical manner of allocating remaining assets. Calculating the appropriate rate and amount of interest to be paid to a myriad of investors has the potential to overwhelm what could otherwise be a relatively simple process pursuant to 11 U.S.C. § 726(a)(5). *See Beguelin*, 220 B.R. at 101 ("It is not hard to imagine the administrative nightmare that bankruptcy trustees would otherwise face if they were required to calculate a different interest rate, based on a different source of interest rate, for each creditor."); *see also, Katchen v. Landy*, 382 U.S. 323, 328 (1966) (stating "a chief purpose of the bankruptcy laws is to secure a prompt and effectual administration . . . of the [bankruptcy] estate . . .") (citation omitted).

The Court recognizes that these two interests, fairness among creditors and administrative efficiency, may be of limited relevance in certain bankruptcy proceedings. Where there are only a few unsecured creditors seeking post-petition interest and there are sufficient assets to pay all claims for all

interest, there will be no concerns regarding equity among creditors or practicality. In those instances, a debtor may receive a windfall from the application of a lower federal interest rate to an award of post-petition interest. Nonetheless "interest at the legal rate" is a statutory term with a definitive meaning that cannot shift depending on the interests invoked by the specific factual circumstances before the court. *See In re Thompson*, 16 F.3d 576, 581 (4th Cir. 1994).

Appellants make a final argument that under the circumstances of this case, an award of interest pursuant to a federal statute violates substantive due process. Assuming, *arguendo*, that there is a substantive right to post-petition interest, Appellants' substantive due process claim fails because the application of the federal interest rate to all claims is rationally related to the legitimate interests in efficiency, fairness, predictability, and uniformity within the bankruptcy system. While the instant case might lend itself to easy application of an alternate interest rate, "a classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Heller v. Doe*, 509 U.S. 312, 321 (1993) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

AFFIRMED.

Supreme Court, U.S.
FILED

02 526 Aug-20 2002

OFFICE OF THE CLERK

No.

In the

SUPREME COURT OF THE UNITED STATES

WILLEM C. ONINK and MARSHA ONINK,

Petitioners,

v.

SAMUEL DUKE CARDELUCCI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

FRED J. KNEZ
Attorney of Record
LAW OFFICES OF FRED J. KNEZ
18493 Halter Lane
Post Office Box 70090
Riverside, CA 92513
(909) 789-1832
Attorney for Petitioners

13 P

SUPPLEMENTAL APPENDIX
TO PETITION FOR
WRIT OF CERTIORARI

Order Affirming Decision of
United States Bankruptcy Court 1

Order On Motion For Order Re
Post-Petition Interest 10

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re SAMUEL DUKE CARDELUCCI, Debtor.	Case No: CV 00-01990 DDP Adversary Case No. SA 93-14797 RA
WILLEM and MARSHA ONINK, Appellants. v. SAMUEL DUKE CARDELUCCI, Respondent.	**ORDER AFFIRMING DECISION OF UNITED STATES BANKRUPTCY COURT** [Appeal filed on 5-1-00]

This matter is before the Court on an appeal from a decision by the United States Bankruptcy Court. The matter was taken under submission without oral argument. After reviewing and considering the materials submitted by the parties, the Court affirms.

I. Background

The appellants in this matter are Willem and Marsha Onink. The respondent and debtor is Samuel Duke Cardelucci. The Oninks and Cardelucci each own and operate several rubbish companies in Southern California.

In the late 1980s, disputes developed between the parties regarding pricing practices in Riverside County. In January 1993, a state trial court found that Cardelucci and his two wholly-owned companies, National Environmental Waste Corporation ("NEWCO") and International Rubbish Service, Inc. ("IRS"), were jointly and severally liable to the appellants for unfair trade practices. (Appellants' Excerpts at 5-7.) In March 1993, the state court entered judgment in the amount of $5,423,825.50, plus interest at the rate of 10 percent per annum from the date of verdict. (Id. at 7.)

On May 3, 1993, Cardelucci filed a voluntary petition for relief under Chapter 11 in United States Bankruptcy Court. (Id. at 10.) The parties stipulated to modify the automatic stay pending appeal of the state court judgment. (Id. at 43-46.) NEWCO and IRS also filed a petition for Chapter 11 relief in May 1993, which was confirmed in June 1994. The NEWCO/IRS plan is not at issue in this appeal. However, payments of more than $3,000,000 under the NEWCO/IRS plan have reduced the base amount of the Oninks' claim. (Id. at 162.)

Meanwhile, Cardelucci pursued appeals of the state court judgment. In February 1996, the California Court of

Appeal affirmed the judgment as to liability, but remanded for recalculation of damages. (Id. At 118-38.) In June 1999, on a second appeal, judgment was affirmed in the modified amount of $5,273,147.50. (Id. At 139-59.)

On September 30, 1999, Cardelucci filed a Modification of Fourth Amended Plan of Reorganization. (Appellee's Excerpts at 17.) The plan provided for payment of the Oninks' claim in full with post-confirmation interest at the rate of five percent per annum. (Id. At 17-18.)

On December 29, 1999, the matter came before the United States Bankruptcy Court on a confirmation hearing and on the appellants' motion for post-petition, pre-confirmation (or "gap") interest. The parties agreed that the Oninks were entitled to gap interest, but disagreed as to the applicable rate of interest. Cardelucci argued that interest should accrue at the applicable federal judgment rate of 3.25 percent. (Id. At 4.) The Oninks argued that, under California law, the applicable rate should be 10 percent. (Appellants' Excerpts at 168).

The Bankruptcy Court, relying primarily on In re Beguelin, 220 B.R. 94 (9th Cir. B.A.P. 1998), found that the federal judgment rate applied. (Id. At 250-51, 289, 301.) After agreeing to additional minor modifications, the Oninks withdrew their objection to the plan without prejudice to their right to appeal the interest rate determination. (Id. At 302-05.) The Bankruptcy Court then ordered the plan confirmed.

The Oninks now appeal. The issues presented are: (1) whether the Bankruptcy Court erred in determining that the applicable post-petition, pre-confirmation interest rate was the federal judgment rate; and (2) whether application of the federal judgment interest rate violates substantive due process.

II Discussion

A. Legal Standard

Statutory interpretation is a question of law subject to de novo review. See In re Beguelin, 220 B.R. at 97 (citing In re Anderson, 209 B.R. 76, 77 (6th Cir. B.A.P. 1997)). The parties agree that the standard of review in this appeal is de novo. (Appellants' Opening Brief at 3: Appellee's Brief at 1.)

B. Whether the Bankruptcy Court Erred in Applying Federal Judgment Interest Rate

The Oninks first argue that the Bankruptcy Court erred in applying the federal judgment interest rate to their claim. As a general rule, creditors are not entitled to post-petition interest on their bankruptcy claims. See 11 U.S.C. § 502(b)(2); In re Kentucky Lumber Co., 860 f.2d 674, 676 (6th Cir. 1988). However, in a Chapter 7 liquidation case, an unsecured creditor is entitled to "payment of interest at the legal rate from the date of the filing of the petition" prior to any distributions to the debtor. 11 U.S.C.§ 726(a)(5). In a Chapter 11 case, a creditor must receive at least as favorable treatment as that accorded in a Chapter 7 case. See 11 U.S.C.§ 1129(a)(7); In re Beguelin, 220 B.R.

at 98-99. Accordingly, where the estate of the debtor is solvent in a Chapter 11 case, post-petition interest must be awarded at the "legal rate" pursuant to Section 726. See In re San Joaquin Estates, Inc., 64 B.R. 534, 536 (9th Cir. B.A.P. 1986).

The Bankruptcy Code does not define the term "interest at the legal rate." As noted by the Ninth Circuit Bankruptcy Appellate Panel, courts are divided over whether to interpret this term under the "state law approach" or the "federal judgment rate approach." See generally In re Beguelin, 220 B.R. at 99.

Under the state law approach, if an express contractual agreement between the debtor and creditor provides for the payment of interest, the contract rate is the "legal rate." See, e.g., In re Schoeneberg, 156 B.R. 963, 971-72 (Bankr. W.D. Tex. 1993). Alternatively, in the absence of a contract, the legal rate is that provided to creditors by applicable state statute. See, e.g., id.; In re Shaffer Furniture Co., 68 B.R. 827, 831 (Bankr. E.D. Pa. 1987), abrogated by In re Chiapetta, 159 B.R. 152 (Bankr. E.D. Pa. 1993). Here, there is no applicable contract between the parties. The Oninks argue that, under California law, the applicable state judgment rate would be 10 percent.

Under the federal judgment rate approach, the "legal rate" is that established by 28 U.S.C.§ 1961. See, e.g., In re Dow Corning Corp., 237 B.R. 380 (Bankr. E.D. Mich. 1999); In re Melenyzer, 143 B.R. 829, 830 (Bankr.

W.D. Tex. 1992); In re Godsey, 134 B.R. 865, 867 (Bankr. M.D. Tenn. 1991). Section 1961 provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court," calculated from the date of judgment at an indexed rate. See 28 U.S.C. § 1961(a). Here, due to the date of the filing of the bankruptcy petition, the applicable federal judgment rate would be 3.25 percent. (Appellee's Excerpts at 9.)

In Beguelin, as here, the Ninth Circuit Bankruptcy Appellate Panel addressed the appropriate rate of post-petition interest on a state court judgment by a single creditor against a solvent debtor. See In re Beguelin, 220 B.R. at 96-97. After discussing the conflicting approaches, the court held that the appropriate measure of interest under Section 726 was the federal judgment rate. See id at 100. The court approved cases relying on "the use of the federal judgment rate as a means of ensuring fairness, equality, and predictability in the distribution of interest on creditors' claims, and on the use of a federal law to decide a federal issue." Id. (Discussing In re Melenyzer). The court also noted the "practicality and cost-effectiveness" of allowing the bankruptcy trustee to apply a single rate of interest to all claims. See id. At 101.

Here, the parties dispute whether interest should be applied under the state law approach or the federal judgment rate approach. The Bankruptcy Court expressed some discomfort at the fact that, administration of this estate, the disparity between the two approaches was

significant. (App. At 290-92.) However, citing the reasoning of In re Beguelin, the court held that the federal judgment rte applied. (Id. At 289,301.)

The Oninks now ask this Court to reverse. The Oninks note that, as a decision of the Bankruptcy Appellate Panel, In re Beguelin is not binding on this Court. See Bank of Maui v Estate Analysis, Inc., 904 F. 2d 470, 471 (9th Cir.1990). The Oninks also argue that the concerns underlying the federal judgment rate approach are not relevant where, as here, the debtor is solvent and there are sufficient funds to pay all creditors' claims. Finally, the Oninks argue that it is error to apply the federal judgment rate in disregard of the equities of the case, where it would produce a windfall to the debtor.

Cardelucci responds that, contrary to the Oninks' contention, courts frequently apply the federal judgment rate to solvent estates. Cardelucci argues that post-petition interest serves the same function as post-confirmation interest, which is a procedural matter governed by federal law. See In re Dow Corning, 237 B.R. at 405 (collecting cases). Cardelucci also argues that reliance on equitable concerns is misplaced because, where the estate is solvent, an award of post-petition interest is not discretionary but mandatory.

After considering these arguments, the Court affirms the decision of the Bankruptcy Court. The Court finds the reasoning of the Beguelin decision persuasive, and agrees that concerns of fairness, predictability, and

practicality support the use of the federal judgment rate in bankruptcy cases. The Court also agrees that post-petition interest is a federal issue, that should be governed by federal rather than state law. The Court notes that the federal judgment rate approach is endorsed by a number of authorities in the field. See, e.g., 6 Collier on Bankruptcy ¶ 726.02(5) (15th ed. rev. 1997); 3 Norton Bankruptcy Law & Practice 2d § 73:7 n.55 (1997 & Supp. 2000). Finally, the Court disagrees that the interpretation of the statutory term "legal rate" should turn on whether the debtor's estate is solvent. In a Chapter 11 case such as this one, for example, solvency is generally a predicate to any award of post-petition interest.

Accordingly, the Court agrees with the Bankruptcy Court that the federal judgment rate is the appropriate measure of post-petition interest in this case.

C. Whether Imposition of the Federal Judgment Interest Rate Violates Substantive Due Process

The Oninks next argue that application of the federal judgment rate in this case violates substantive due process. Specifically, the Oninks argue that application of the federal judgment interest rate in this case is arbitrary and unreasonable, because it would produce an unjustified windfall to the debtor. Substantive due process requires only that economic regulations be rationally related to a legitimate legislative purpose. See Duke Power Co. v Carolina Environmental Study Group ,Inc. 438 U.S. 59, 83

(1978); Levald, Inc. v City of Palm Desert, 998 F.2d 680,690 (9th Cir. 1993). For the reasons discussed above, the Court finds that the federal judgment rate approach is rationally related to the legitimate concerns of fairness, predictability, and practicality. Accordingly, the Court rejects the Oninks' substantive due process argument.

III Conclusion

For the reasons set forth above, the order of the Bankruptcy Court is affirmed.

IT IS SO ORDERED.

Dated: 8-7-00

DEAN D. PREGERSON
United States District Judge

William M. Burd - Bar No. 90801
Karen Sue Naylor - Bar No. 144273
BURD & NAYLOR
200 W. Santa Ana Blvd., Ste. 400
Santa Ana, California 92701
(714) 708-3900 (telephone)
(714) 708-3949 (facsimile)

Attorneys for Debtor

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re SAMUEL DUKE CARDELUCCI, Debtor.	Case No. SA 93-14797 RA Chapter 11 ORDER ON MOTION FOR ORDER RE POST-PETITION INTEREST Hearing Date Date: December 29, 1999 Time: 8:45 a.m. Ctrm: 6C

The Motion of Willem and Marsha Onink for an order re post-petition interest came on regularly for hearing on the captioned ate and time before the Honorable Robert W. Alberts, United States Bankruptcy Judge. The Oninks appeared through their attorney of record, Thompson & Colgate, by John A. Boyd and the Law Offices of Fred J. Knez by Fred J. Knez. The Debtor-in-Possession and Respondent appeared through his attorney of record, Burd &

Naylor, by William M. Burd.

Upon consideration of all papers, pleadings and files of record and the argument of counsel, the Court made its findings of fact and conclusions of law on the record. In accordance therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the Oninks are entitled to post-petition interest on their judgment and the California State Court should appropriately determine the date of commencement of interest on the revised judgment. The applicable interest rate for distributions on such judgment in this Chapter 11 case is the Federal judgment rate, rather than the state judgment rate.

February 1, 2000

ROBERT W. ALBERTS
United States Bankruptcy Judge